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HARNESS Dickey PIERCE

NO. 227 P. 1

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Total Number of Pages in This Submission

10

Application Number	10/673,296
Filing Date	September 29, 2003
First Named Inventor	Michael Mittelstein, et al.
Art Unit	3746
Examiner Name	Emmanuel Sayoc
Attorney Docket Number	P03115 (6639-000035/US)

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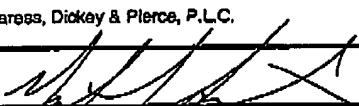
AUG 31 2006

ENCLOSURES (Check all that apply)

<input type="checkbox"/> Fee Transmittal Form <input type="checkbox"/> Fee Attached <input type="checkbox"/> Amendment / Reply <input type="checkbox"/> After Final <input type="checkbox"/> Affidavits/declaration(s) <input type="checkbox"/> Extension of Time Request <input type="checkbox"/> Express Abandonment Request <input type="checkbox"/> Information Disclosure Statement <input type="checkbox"/> Certified Copy of Priority Document(s) <input type="checkbox"/> Reply to Missing Parts/ Incomplete Application <input type="checkbox"/> Reply to Missing Parts under 37 CFR1.52 or 1.53	<input type="checkbox"/> Drawing(s) <input type="checkbox"/> Licensing-related Papers <input type="checkbox"/> Petition <input type="checkbox"/> Petition to Convert to a Provisional Application <input type="checkbox"/> Power of Attorney, Revocation Change of Correspondence Address <input type="checkbox"/> Terminal Disclaimer <input type="checkbox"/> Request for Refund <input type="checkbox"/> CD, Number of CD(s) _____ <input type="checkbox"/> Landscape Table on CD	<input type="checkbox"/> After Allowance Communication to TC <input type="checkbox"/> Appeal Communication to Board of Appeals and Interferences <input checked="" type="checkbox"/> Appeal Communication to TO (Appeal Notice, Brief, Reply Brief) <input type="checkbox"/> Proprietary Information <input type="checkbox"/> Status Letter <input type="checkbox"/> Other Enclosure(s) (please identify below):
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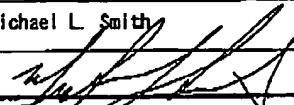
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SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm	Harness, Dickey & Pierce, P.L.C.		
Signature			
Printed Name	Michael L. Smith		
Date	August 31, 2006	Reg. No.	35,685

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HARNESS DICKEY PIERCE

NO. 227 P. 2

Attorney Docket No.: P03115 (6639-000035/US)

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

AUG 31 2006

Application of: Mittelstein, et al.)	Examiner: Emmanuel Sayoc
Serial No.: 10/673,296)	Group No.: 3746
Filed: September 29, 2003)	Docket No: P03115
Title: PERISTALTIC PUMP WITH MOVEABLE) PUMP HEAD)	(6639-000035/US)

**AMENDED APPEAL BRIEF
(37 C.F.R. § 41.37)**

Mail Stop Appeal Brief – Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313

Dear Sir:

Applicant appeals the Final Rejection in the above-identified application dated 18 April 2006, and submits this Amended Brief in support thereof. It is believed that no extensions of time are required. If any other fees, including any extensions of time, are required, please charge Deposit Account No. 08-0750.

I. REAL PARTY IN INTEREST

The real party in interest in the present case is Bausch & Lomb Incorporated.

II. RELATED APPEALS AND INTERFERENCES

There are no other related Appeals or Interferences known to Appellant.

III. STATUS OF CLAIMS

Currently pending claims 1-4 stand rejected under 35 U.S.C. §102 (b). Claims 1, 2, and 4 have been amended and claim 3 was originally filed. All the claims are being appealed.

IV. STATUS OF AMENDMENTS

No amendment was filed subsequent to the final rejection.

V. SUMMARY OF INVENTION

The present invention relates to a peristaltic pump 10 for use in ophthalmic surgery wherein the pump head 14 is moveable relative to the housing 12 and the backing plate 18. See FIGs. 1-5 and specification page 5, paragraph 21 thru page 9, paragraph 29.

Independent claim 1 claims a peristaltic pump 10 for use in ophthalmic surgery having a housing 12, a pump head 14 having a plurality of rollers 16 held within the housing 12, a backing plate 18 attached to the housing 12, resilient surgical tubing 50 positioned between the pump head 14 and the backing plate 18, wherein the pump head 14 is moveable relative to the housing 12 and the backing plate 18, such that when the pump head 14 is in an open position the surgical tubing 50 is easily inserted between the pump head 14 and the backing plate 18 and wherein the pump head 14 then translates towards the backing plate 18 to an operative position, such that as the pump head 14 is rotated the rollers 16 and backing plate 18 cooperate to compress the tubing 50 to peristaltically pump aspirant from a surgical site through the tubing 50. See FIGs. 1-5 and specification page 5, paragraph 21 thru page 9, paragraph 29 and especially page 7, paragraphs 26-27.

Independent claim 2 claims a peristaltic pump 10 for use in ophthalmic surgery having a housing 12, a pump head 14 having a plurality of rollers 16 held within the housing 12, a backing plate 18 attached to the housing 12 and for

cooperation with the pump head 14, and wherein the pump head 14 moves relative to the housing 12 and towards and away from the backing plate 18. See FIGs. 1-5 and specification page 5, paragraph 21 thru page 9, paragraph 29 and especially page 5, paragraph 22.

Independent claim 3 claims a peristaltic pump 10 for use in ophthalmic surgery comprising a housing 12, a pump head 14 having a plurality of rollers 16 extending from the housing 12, a backing plate 18 attached to the housing 12 and for cooperation with the pump head 14, and wherein the pump head 14 moves relative to the housing 12 and backing plate 18 from an open position to an operative position for insertion of resilient surgical tubing 50 between the rollers 16 and the backing plate 18 for peristaltically pumping aspirant through the tubing 50 from a patient's eye during surgery. See FIGs. 1-5 and specification page 5, paragraph 21 thru page 9, paragraph 29 and especially page 7, paragraph 27.

Independent claim 4 claims a peristaltic pump 10 for use in ophthalmic surgery comprising, a housing 12, a pump head 14 having a plurality of rollers 16 held within the housing 12, a backing plate 18 attached to the housing 12 and for cooperation with the pump head 14, a surgical cartridge 30 including a length of resilient tubing 50 connected to a collection bag 64 and for connection to a surgical aspiration device via additional tubing 48, and a cartridge holder drawer 24 for holding the surgical cartridge 30 and moveable from an open position to an operative position, and wherein the pump head 14 moves relative to the housing 12, such that after the drawer 24 moves from the open position to the operative position, the pump head 14 is moved toward the backing plate 18, such that the rollers 16 and the backing plate 18 cooperate to peristaltically pump aspirant through the length of tubing 50 as the pump head 14 is rotated. See FIGs. 1-5 and specification page 5, paragraph 21 thru page 9, paragraph 29 and especially page 7-8, paragraph 27

VI. ISSUES

The issue raised on this Appeal is whether each independent claim 1-4 has been improperly rejected under 35 U.S.C. §102 (b) as being anticipated by US Patent

4,713,051 to Steppe et al. Each independent claim 1-4 has been rejected on the same ground, that the claims are anticipated by Steppe.

VII. GROUPING OF CLAIMS

Claims 1-4 are each an independent claim.

VIII. ARGUMENTS

The case currently stands rejected under §102 as being anticipated by Steppe et al. It is respectfully submitted that Steppe et al. does not anticipate any of the four pending independent claims for at least the following reasons.

The Examiner asserts that Steppe teaches a pump with a pump head that is moveable relative to both a pump housing and a backing plate. This is simply not true. The pump head 82 of Steppe is only moveable in the sense that it is mounted on a slidable plate 76 that is biased by a springs 78 and 79; otherwise pump head 82 is stationary.

REJECTION RELATIVE TO CLAIM 1

As to independent claim 1 it is respectfully asserted that the head 82 of Steppe et al. is not moveable relative to both the housing and a backing plate, as specifically claimed. The pump head 82 of Steppe et al. will not move relative to opening 32, which is the only structure that could be argued to be a backing plate in the sense of the present invention. The pump head 82 will move as cassette 20 is inserted into unit 22 but will only move with the opening 32; therefore the head 82 will not move relative to the opening 32 but rather moves in unison with the opening 32. So head 82 always remains stationary relative to the opening 32. Therefore, Steppe et al. does not disclose the specifically claimed element of a pump head movable relative to the backing plate.

The Examiner, relative to claim 1, asserts that the pump head 82 of Steppe et al. moves towards opening 32. It is respectfully submitted that no such movement occurs. The spring biased plate 76 upon insertion of the cassette 20 only will move in the same direction as the cassette moves. The opening 32

moves, during insertion, relative to the head 82 but never does the head 82 move relative to the opening 32 as specifically claimed. In addition, the head 82 never moves towards the backing plate to an operative position as specifically claimed.

In addition, the Examiner asserts that the opening 32 is attached to the housing as specifically claimed. This is simply an unreasonably broad interpretation of attached. The opening 32 is part of cassette 20, which is a totally separate structure from unit 22 and is a removable device. To say that the opening 32 is attached to the housing is simply not credible. The opening 32 is formed in cassette 20. The cassette 20 is then attached to the cassette mechanism (co. 9, lines 29-30). It is unclear to what the cassette mechanism is attached. Therefore, yet another limitation of claim 1 is not met by Steppe et al.

REJECTION RELATIVE TO CLAIM 2

As to independent claim 2, the same arguments presented above apply. In addition, claim 2 requires that the pump head moves relative to the housing and towards and away from the backing plate. Since the plate 76 of Steppe et al. is only spring biased and not independently movable the head 82 cannot be said to move both towards and away from the opening 32. At best head 82 can only be said to move in one direction, with the movement of opening 32 as cassette 20 is inserted.

REJECTION RELATIVE TO CLAIM 3

As to independent claim 3, the same arguments presented above apply. The opening 32 of Steppe et al. is not attached to the housing of the unit 22 and the pump head 82 does not move relative to the housing and a backing plate, as required by the claim.

REJECTION RELATIVE TO CLAIM 4

As to independent claim 4, the same arguments presented above apply. In addition claim 4 includes a surgical cartridge (or cassette) that is separate from the backing plate. Claim 4 specifically sets forth that the backing plate is attached to the housing and the cartridge is placed in a drawer. This clearly distinguishes Steppe et al. as the opening 32 is part of the cartridge. Contrary to

the Examiner's arguments claim 4 clearly sets forth a backing plate that is separate from the surgical cartridge.

Claim 4 furthers sets forth that the drawer is moveable from an open position to an operable position. Steppe et al. do not disclose a drawer but rather a slot 26. A slot is not a drawer that moves as claimed, but rather is simply a stationary hole into which cassette 20 is inserted. The Examiner asserts that the cassette bottom housing 28 and cassette edge 36 with slot 26 form a drawer. It is totally illogical to say that a thing to be inserted (the cassette 20, including bottom 28 and edge 36) can itself form the drawer. Things, e.g. cassettes or cartridges are placed into drawers or slots but are not themselves drawers or slots. Therefore, Steppe et al. is totally void of this claimed element.

Claim 4 still further claims that, after the drawer has moved to the operative position, the pump head moves toward the backing plate. Even if the cassette and slot in some stilted and illogical way could be said to be a drawer that moves, once the 'drawer' had moved in Steppe et al. the pump head 82 in no way moves as claimed in the present invention.

As the Federal Circuit has stated "anticipation requires the disclosure in a single prior art reference of each element of the claim under consideration". *W.L. Gore & Assocs. V Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303, 313 (Fed. Cir. 1993). The Examiner has wholly failed to show such anticipation. In view of the above arguments, it is clear that Steppe et al. does not anticipate any of the four independent claims and the present application is in condition for allowance at an early date.

IX. CLAIMS APPENDIX

1. (Previously Amended) A peristaltic pump for use in ophthalmic surgery

comprising:

a housing;

a pump head having a plurality of rollers held within the housing;

a backing plate attached to the housing;

resilient surgical tubing positioned between the pump head and the backing plate; and

wherein the pump head is moveable relative to the housing and the backing plate, such that when the pump head is in an open position the surgical tubing is easily inserted between the pump head and the backing plate and wherein the pump head then translates towards the backing plate to an operative position, such that as the pump head is rotated the rollers and backing plate cooperate to compress the tubing to peristaltically pump aspirant from a surgical site through the tubing.

2. (Previously Amended) A peristaltic pump for use in ophthalmic surgery comprising:

a housing;
a pump head having a plurality of rollers held within the housing;
a backing plate attached to the housing and for cooperation with the pump head; and

wherein the pump head moves relative to the housing and towards and away from the backing plate.

3. (Original) A peristaltic pump for use in ophthalmic surgery comprising:

a housing;
a pump head having a plurality of rollers extending from the housing;
a backing plate attached to the housing and for cooperation with the pump head; and

wherein the pump head moves relative to the housing and backing plate from an open position to an operative position for insertion of resilient surgical tubing between the rollers and the backing plate for peristaltically pumping aspirant through the tubing from a patient's eye during surgery.

4. (Previously Amended) A peristaltic pump for use in ophthalmic surgery

comprising:

a housing;

a pump head having a plurality of rollers held within the housing;

a backing plate attached to the housing and for cooperation with the

pump head;

a surgical cartridge including a length of resilient tubing connected to a collection

bag and for connection to a surgical aspiration device via additional

tubing; [and]

a cartridge holder drawer for holding the surgical cartridge and

moveable from an open position to an operative position; and

wherein the pump head moves relative to the housing, such that after

the drawer moves from the open position to the operative position, the

pump head is moved toward the backing plate, such that the rollers and

the backing plate cooperate to peristaltically pump aspirant through the

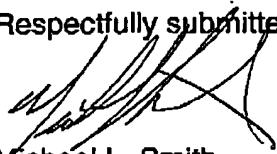
length of tubing as the pump head is rotated.

X. EVIDENCE APPENDIX

None

XI. RELATED PROCEEDINGS APPENDIX

None

Respectfully submitted,

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Reg. No. 35,685

DATE: August 31, 2006

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